

**POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

EMMA DIXON, GERALD FARRIS, and  
SNO-KING ENVIRONMENTAL  
ALLIANCE,

Appellants,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY and KING  
COUNTY DEPARTMENT OF NATURAL  
RESOURCES AND PARKS  
WASTEWATER TREATMENT DIVISION,

Respondents.

PCHB NOS. 05-030, 05-059

ORDER GRANTING SUMMARY  
JUDGMENT

This matter comes before the Pollution Control Hearings Board (Board) on a Motion for Summary Judgment filed by Respondent King County Department of Natural Resources and Parks Wastewater Treatment Division (County). Appellants are challenging two NPDES permits issued by the Washington State Department of Ecology (Ecology) for discharge of water during the construction of a wastewater treatment plant and its associated conveyance lines. The County is asking the Board to uphold the permits and dismiss these appeals on summary judgment.

1 The Board was comprised of Chair Bill Clarke and Member William H. Lynch.<sup>1</sup>  
2 Administrative Appeals Judge, Kay M. Brown presided for the Board. Verna P. Bromley, King  
3 County Prosecuting Attorney and Gillis Reavis, Foster Pepper & Shefelman, represented King  
4 County. Joan M. Marchioro, Senior Assistant Attorney General, represented Ecology.  
5 Appellants Emma Dixon and Gerald Farris represented themselves. Charles Blaine, member,  
6 represented Sno-King Environmental Alliance (SKEA).

7 In rendering its decision, the Board considered the following submittals:

- 8 1. King County's Motion for Summary Judgment, Declaration of Chris Tiffany with  
9 attached Exhibits A and B, Declaration of Gillis Reavis with attached Exhibits A  
10 through C, and copies of federal case cited by King County;
- 11 2. King County's Erratum Regarding Title of Declaration;
- 12 3. Ecology's Response to King County's Motion for Summary Judgment;
- 13 4. Appellants' Response to King County's Motion for Summary Judgment,  
14 Declaration of Emma J. Dixon with attached Exhibits A through V, and  
15 Declaration of James Macrae; and
- 16 5. King County's Reply to Appellants' Response.

17 In addition to the submittals listed above, the Board also considered the material  
18 submitted by both parties related to the prior motion for a stay filed by Appellants. This material  
19 includes:

- 20 6. Appellants' Notice of Appeal;
- 21 7. Appellants' Motion for an Order to Stay Department of Ecology's Permits,  
Declaration of Emma Dixon and attached exhibits 1-10;

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<sup>1</sup> The third position on the Board is currently vacant.



1 adequate number of alternatives to the preferred proposal, and that there was insufficient  
2 discussion of the probable adverse impacts of the proposal regarding the potential impact of  
3 seismic events. On August 3, 2004, King County Hearing Examiner *pro tem* James N.  
4 O'Connor denied SKEA's appeal as it related to site selection. He found that the FEIS provided  
5 "a reasonably adequate analysis of possible damage to the influent and effluent pipelines from  
6 seismic events, including pipeline rupture that might occur from movement of earthquake faults  
7 that are necessarily crossed by the pipelines." (Dixon Decl., Ex. 1, p. 12).

8         However, he found that the FEIS provided insufficient information and analysis  
9 concerning suspected fault lines under the treatment plant site itself. He noted that "[t]he  
10 opening and inspection of a trench is the method now generally accepted by earthquake  
11 geologists to ascertain the presence or absence of a fault in a suspected area...." Such  
12 information, he said, was essential "as the basis for a reasonable discussion and analysis" of  
13 potential seismic impacts, and without that additional information, "the November 19, 2003,  
14 FEIS is not adequate for future government actions that will determine the location of  
15 wastewater treatment facilities on the Route 9 site *or provide the permits that are required for*  
16 *the construction of improvements to the site.*" *Id.* (italics added). Examiner O'Connor therefore  
17 denied SKEA's appeal and found the FEIS adequate as of its date of issuance subject to the  
18 condition that King County excavate at least one investigative trench on or near the Route 9 site  
19 and prepare a supplemental EIS. *Id.* King County subsequently completed the trenching and  
20 issued a draft supplemental EIS. (Dixon Decl., Ex. 8).

1           SKEA appealed the Hearing Examiner's decision to the King County Superior Court, and  
2 King County filed a cross-appeal. (Reavis Decl., p. 2). On June 17, 2005, King County Superior  
3 Court Judge Theresa B. Doyle issued Findings of Fact and Conclusions of Law upholding the  
4 adequacy of the FEIS and dismissing as moot King County's appeal regarding the Hearing  
5 Examiner's requirement for exploratory trenching. Judge Doyle determined that because King  
6 County had completed the trenching and had already begun preparation of a Supplemental EIS,  
7 the question of the Hearings Examiner's authority to order exploratory trenching and further  
8 analysis was moot. *In re: Appeals of Adequacy of Brightwater Environmental Impact Statement*  
9 *Brought By Stockpot, Inc., et al.*, Case No. 04-2-21301-1 SEA (King County Superior Court,  
10 June 17, 2005).

11           The County is required to obtain two NPDES permits for the discharge of stormwater  
12 related to construction activity. One permit covers discharge associated with construction of the  
13 wastewater treatment plant, and one covers discharge associated with construction of the  
14 conveyance system. Ecology determined that the project did not qualify for coverage under its  
15 general stormwater construction permit, and the County filed applications for individual  
16 construction stormwater NPDES permits. It filed an application for an individual construction  
17 stormwater NPDES permit for construction of the wastewater treatment facility on April 6, 2004,  
18 and for construction of the conveyance system on June 3, 2004. (Henley Decl., p. 2).

19           Ecology subsequently prepared draft individual permits for both applications and made  
20 them available for public comment. In preparing these permits, Ecology reviewed the water  
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1 quality sections of the FEIS, deemed them adequate for purposes of permitting, and used them in  
2 crafting the NPDES permits. (Henley Decl., p. 2). Ecology issued the individual construction  
3 stormwater permit for the conveyance system on January 31, 2005, and for the wastewater  
4 treatment plant on March 17, 2005. (Reavis Decl., Exs. A and B).

5 PROCEDURE AT THE PCHB

6 Appellants Emma Dixon, Gerald Farris, and SKEA appealed Ecology's approval of the  
7 NPDES permits to this Board. They also filed a motion for a stay of the permits. In their  
8 motion, Appellants argued that they were likely to prevail on two of the many issues identified in  
9 the appeal. The two issues argued in the stay motion were:

- 10 a) Whether the Department of Ecology violated a King County Hearing Examiner's  
11 [August 3, 2004] ruling prohibiting any permits or government actions relating to  
12 construction until a Final Supplemental EIS has been issued.  
13 b) Whether King County failed to obtain a valid NPDES permit by neglecting to  
14 identify both the conveyance portal located on the treatment plant site and its  
15 receiving waters prior to applying for a grading permit with Snohomish County for  
16 this location

15 Following submittals by the County and Ecology in response to the motion, and the filing of a  
16 reply by Appellants, the Board issued an order denying the motion for a stay. *Dixon et.al. v.*  
17 *Ecology et. al.*, PCHB No. 05-030, 05-059 (Denial of Motion for Stay)(June 15,  
18 2005)(hereinafter referred to as "Order Denying Stay"). In its Order Denying Stay, the Board  
19 concluded Appellants were unlikely to prevail on either of the two issues argued in the stay  
20 motion, and that Appellants had failed to demonstrate irreparable harm.

King County has now moved for summary judgment on all issues in the case. These issues are:

1. Whether Ecology's issuance of NPDES No. WA-003204-2 complied with applicable laws and regulations in its consideration of the following:
  - a) Potential seismic faults;
  - b) Potential dewatering discharges;
  - c) Potential loss of water supply;
  - d) Potential cumulative impacts of increased impervious surfaces;
  - e) Potential release of raw sewage in case of catastrophic failure;
  - f) Lack of supplemental DEIS;
  - g) Identification of a conveyance portal at the treatment plant site<sup>2</sup>;
  - h) Adequacy of public hearings, analytical methodologies, and consideration of public comments; and
  - i) Analysis of need for the Brightwater system.
2. Whether the Board has jurisdiction over King County's alleged failure to comply with SEPA, specifically with regard to the following:
  - a) Whether, in the context of an appeal of this NPDES construction stormwater permit, the appellants may appeal post-construction issues that pertain to operation of the Brightwater treatment plant;
  - b) Whether the potential loss of water supply falls within the jurisdictional scope of an NPDES stormwater permit appeal;
  - c) Whether the Board has jurisdiction to in the context of this NPDES construction permit appeal to decide issues related to King County's decision not to issue a supplemental draft EIS on the Brightwater project prior to issuance of the Final EIS in November 2003, and
  - d) Whether the need for the Brightwater Project is properly within the scope of this NPDES construction stormwater permit appeal; and

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<sup>2</sup> The Appellants have agreed to dismissal of this issue. See Appellants' Response to King County Motion at 22.

1 e) Whether Ecology and the County failed to abide with the August 3, 2004,  
2 decision of Hearing Examiner James O'Connor on the adequacy of the  
Brightwater FEIS.<sup>3</sup>

### 3 ANALYSIS

#### 4 A. Summary Judgment Standard

5 Summary judgment is a procedure available to avoid unnecessary trials on formal issues  
6 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the  
7 opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152, 1155 (1977). The party  
8 moving for summary judgment must show there are no genuine issues of material fact and the  
9 moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co.,*  
10 *Inc.*, 131 Wn. 2d 171, 182; 930 P. 2d 307, 313 (1997). A material fact in a summary judgment  
11 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d  
12 451, 456, 824 P. 2d 1207, 1210 (1992). The trier of fact must construe the evidence and consider  
13 the material facts and all reasonable inferences therefrom in the light most favorable to the  
14 nonmoving party. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 131, 822 P. 2d 1257 (1992). If  
15 the moving party is a respondent and meets this initial showing, then the inquiry shifts to the  
16 party with the burden of proof at trial. If, at this point, the non-moving party fails to make a  
17 showing sufficient to establish the existence of an element essential to that party's case, and on

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18 <sup>3</sup> This decision does not address issues 2 (a) through (d) separately, because the issues are subsumed by issues 1 (a)  
19 though (i), and the discussions pertaining thereto. Issue 2(e)(whether Ecology and the County failed to abide by the  
20 Hearing Examiner's decision) was the subject of detailed analysis in the stay order. The Board concluded King  
21 County and Ecology were likely to prevail on this issue. King County now seeks summary judgment on this issue  
based on the prior holding in the stay order. Although the stay order is not binding precedent on this issue, it does  
reflect the analysis of the Board based on the information it had at the time of the stay. Appellants have made only  
limited additional argument on this issue, which is addressed in Section B of this decision.



1 which that party will bear the burden of proof at trial, then the trial court should grant the motion.

2 *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187(1989).

3 Here, the Board concludes that there are no contested issues of material fact, and  
4 therefore this matter can be decided on summary judgment.

5 B. Seismic Activity (Issues 1 (a) and (e)) and 2(e)

6 Appellants have challenged the NPDES permits for their alleged failure to adequately  
7 address the risks from seismic activity.<sup>4</sup> This issue is closely tied to Appellants' argument that  
8 the NPDES permits should not have been approved until completion of the supplemental EIS,  
9 and that by approving the permits Ecology violated the King County Hearing Examiner's  
10 decision. Both of these issues were analyzed extensively in the Board's order denying the stay  
11 motion. *See* Order Denying Stay, pp. 5-9. Although this analysis was done in the context of  
12 determining the Appellants' likelihood of prevailing on the merits of the issue at hearing, absent  
13 new arguments or new factual material related to the issue, the analysis is still applicable.

14 Appellants, in their response to the summary judgment motion, do offer more factual  
15 support for their contentions regarding seismic risks than they did on the motion for a stay. *See*  
16 Dixon Decl. in Response to Summary Judgment, Exhibits C through G. However, this factual  
17 material does not strengthen the connection between the risks posed by seismic activity and the  
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20 <sup>4</sup>With regard to the potential for release of raw sewage during a seismic event (issue 1(e)), the Board concludes that  
21 this is a post-construction issue that is beyond the scope of this appeal. Raw sewage will not be present at the plant  
or in the conveyance system until the plant is operational. Therefore, this issue is not relevant to a review of the  
NPDES permits approved for discharges during construction.

1 matters regulated by Ecology in its approval of NPDES permits for discharges of stormwater  
2 during construction. As the Board stated in its Order Denying Stay:

3 Ecology's NPDES permits establish conditions relating to the control, treatment, and  
4 discharge of stormwater generated during the construction of the wastewater treatment  
5 plant and conveyance system. The water quality effluent limits and best management  
practices required in the permits would apply to the treatment plant located on the Route  
9 site regardless of where or how the plant is configured on the site . . .

6 Order Denying Stay, p. 6. The Board went on to quote the fact sheet accompanying Permit WA-  
003204-2:

7 .  
8 The construction stormwater NPDES permits are water quality permits that regulate the  
stormwater runoff from a construction site and the effects of dewatering waters (i.e.  
9 pumped groundwater) on surface waters and groundwaters. The permits bear no relation  
to the types and locations of permanent structures on the Route 9 site nor do they describe  
10 the locations of temporary, construction stormwater settling ponds used for treatment.  
The construction stormwater permits set conditions to ensure that stormwater runoff and  
11 dewatering waters from the construction site does not cause harm to Little Bear Creek or  
underlying groundwaters. The terms and conditions of the permits apply to the term of  
12 the construction phase only and are applicable whether or not a fault exists and whether  
or not a fault is active or an event occurs.

13 The Board concluded that:

14 Because the SEIS would not in any way change the basis for the conditions in the  
NPDES permits, there is no practical reason for enjoining Ecology from issuing them.  
15

16 *See* Order Denying Stay, p. 6. Nothing in Appellants' response to the summary judgment  
17 persuades the Board that this conclusion is incorrect.

18 Appellants also argue that Ecology should not have relied on the Brightwater FEIS  
19 because it was inadequate. They contend that because the conclusions in the FEIS and its  
20 accompanying technical memorandum lack a stamp of a licensed geologist, the conclusions are  
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1 not reliable. They contrast this material with additional evidence that they offer from Dr. Yeats  
2 that offers technical geological criticism of the FEIS, and is supported by his professional  
3 geological stamp. (Dixon Decl. in Response to Summary Judgment, Ex. C). Here again, the  
4 information being challenged in the FEIS goes to seismic activity, and not water quality. This  
5 information is not relevant to Ecology's decision to approve the NPDES permits for discharges  
6 during construction. Further, the adequacy of the FEIS was already challenged by the Appellants  
7 in another forum, and upheld. Ecology was entitled to review and rely on the completed final  
8 Brightwater EIS when approving the NPDES permits. It was not required to wait for completion  
9 of a supplemental EIS addressing the risk of seismic activity at the proposed site of the treatment  
10 facility when such information was not relevant to the approval of the NPDES permits.

11 Appellants' next argument against summary judgment on this issue goes to Ecology's  
12 compliance with WAC 197-11-070. This rule states:

13 (1) Until the responsible official issues a final determination of nonsignificance or final  
14 environmental impact statement, no action concerning the proposal shall be taken by a  
governmental agency that would:

- 15 (a) Have an adverse environmental impact; or  
(b) Limit the choice of reasonable alternatives.

16 Appellants argue that Ecology's approval of the NPDES permits prior to completion of  
17 the supplemental EIS violates this rule. However, as the Board opined in its Order Denying  
18 Stay:

19 WAC 197-11-070(1) prohibits an agency from taking certain actions that could have an  
20 adverse environmental impact or limit the choice of reasonable alternatives only "[u]ntil  
the responsible official issues a final determination of non-significance or final  
21 environmental impact statement." Here, King County issued a final EIS in November

1 2003, which the hearing Examiner and Superior Court upheld. When Ecology reviewed  
2 the FEIS and determined that it was sufficient for purposes of the NPDES permits, it  
3 satisfied its obligations under WAC 197-11-070.

4 *See* Order Denying Stay, p. 8. Appellants offer no new evidence or arguments that would  
5 change the Board's conclusion on this point.

6 Appellants' final argument against summary judgment on these issues is that Ecology  
7 was required by the Hearing Examiner's Order to wait until the SEIS was completed before  
8 issuing the NPDES permits. As already stated, this issue was extensively analyzed in the order  
9 denying the motion for stay. *See* Order Denying Stay, pp. 5-8. However, Appellants make a  
10 new argument related to this issue. They contend that King County inappropriately influenced  
11 Ecology by sending a letter to Ecology's legal counsel from their legal counsel analyzing the  
12 effect of the Hearing Examiner's Decision on Ecology's authority to proceed with issuance of  
13 the NPDES permits for construction discharges. *See* Dixon Decl. in Response to Summary  
14 Judgment, Ex. J. In this memorandum, King County set forth their arguments in support of  
15 Ecology's authority to proceed without issuance of the Supplemental EIS. The fact that King  
16 County attempted to persuade Ecology to proceed with issuance of the permits is not relevant to  
17 the correctness of Ecology's decision to do so. The correctness of Ecology's actions was already  
18 evaluated by the Board in the Order Denying Stay. No additional arguments have been  
19 presented that in the response to summary judgment that change this analysis.

20 The Board concludes that Respondents are entitled to summary judgment on Issues 1(a)  
21 and (e), and 2(e).

1 C. Dewatering (Issues (1)(b) and (c))

2 Appellants' arguments, as presented in their response to the summary judgment on these  
3 issues, are two fold. First, appellants contend that the turbidity in future discharges will violate  
4 the NPDES permit limits. Second, they argue that the volume of water being withdrawn is an  
5 issue because it is not all being put back into the Lake Washington drainage, and therefore the  
6 reduction of available water could impact the potential beneficial use of groundwater by  
7 residents in violation of WAC 173-216-110(1)(d).

8 Appellants' first argument is an enforcement issue that is beyond the scope of this  
9 board's jurisdiction. *Ortman, et. al. v. Department of Ecology, et.al*, PCHB No. 99-115 and 116  
10 (Order Granting Summary Judgment and Dismissal)(February 15, 2000)(holding PCHB lacks  
11 jurisdiction over enforcement issues); RCW 43.21B.110. If in the future, discharges occur that  
12 violate the permit, Ecology is the agency charged with taking action to enforce the permit. If  
13 Ecology's action is appealed to this Board, the Board will then have jurisdiction to review  
14 Ecology's action. Until that point, however, the Board does not have jurisdiction over  
15 enforcement actions.

16 Appellants' second argument goes to availability of water left behind after dewatering to  
17 facilitate construction, not the quality of the water discharged during construction activities. The  
18 availability of water, as opposed to water quality, is a water rights issue beyond the scope of an  
19 NPDES permit appeal. *See Cascade Gateway Foundation et. al. v. Ecology et. al.*, PCHB No.

02-095 (Order Denying Motion for Partial Summary Judgment)(Feb. 24, 2003) p.7, n. 4 (Order Granting Motions in Limine)(March 10, 2003).

Appellant cites WAC 173-216-110 for support for its position that Ecology must consider the effect on beneficial uses of groundwater when approving an NPDES permit. WAC 173-216-110, a rule pertaining to the state waste discharge program states:

1) Any permit issued by the department shall specify conditions necessary to prevent and control waste discharges into the waters of the state, including the following, whenever applicable:

...

(d) Any conditions necessary to meet applicable water quality standards for surface waters or to preserve or protect beneficial uses for ground waters;

It is true that the rule requires Ecology to consider the effect on beneficial uses of groundwater, but only from “discharges.” Here, Appellants’ concerns regarding dewatering do not stem from a discharge into water, but from a withdrawal of water. This issue is not covered by the NPDES permit.

The Board concludes that the dewatering issues are beyond the scope of this appeal, and grants summary judgment to King County on issues (1)(b) and (c).

#### D. Impervious Surfaces (Issue 1(d))

King County argues that Appellants’ issue pertaining to impervious surfaces should be dismissed because it is beyond the scope of an appeal of NPDES permits issued for discharges during construction activities. A review of Appellants’ argument on this issue confirms the correctness of King County’s position.

1 Appellants argue that King County can't make claims regarding the size, ratio, or impacts  
2 of impervious surfaces without a final design in place for the Brightwater treatment facility.<sup>5</sup>  
3 They point to changes in the plans related to the size of the buildings, spaces between buildings,  
4 creeks and pond configurations, and the design of the stormwater canal. Clearly these are "post  
5 construction" issues pertaining to run-off from impervious surfaces created as part of the facility.  
6 This type of run-off is not relevant to the discharges during construction regulated by these  
7 NPDES permits. The Board agrees that this issue is beyond the scope of this appeal, and grants  
8 summary judgment to the Respondents on this issue.

9 E. Lack of Supplemental EIS (Issue 1(f))

10 Appellants argue that Ecology's approvals of the NPDES permits for construction  
11 discharges are flawed because Ecology relied on the County's Brightwater FEIS. Ecology had  
12 provided comments on the draft EIS document and Appellants contend the County never  
13 adequately addressed Ecology's comments in the FEIS. *See* Dixon Decl. in Response to  
14 Summary Judgment, Ex. P. Since Ecology approved the NPDES permits without waiting for  
15 issuance of the Supplemental EIS, Ecology never had an opportunity to comment on the  
16 responses the County made in the FEIS.

17 Here again, this argument distills down to Appellants' argument that the NPDES permits  
18 should not have been issued prior to completion of the Supplemental EIS. The Board considered  
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20 <sup>5</sup> The only factual material in the record pertaining to the amount of impervious surfaces before and after  
21 construction was submitted by King County. According to this evidence, there will be fewer impervious surfaces  
after construction than before construction. *See* Tiffany Decl., p. 2.

1 and rejected this argument in Section B above. Further, as King County points out, if Ecology  
2 was dissatisfied with the County's responses to its comments on the draft EIS, it would not have  
3 issued the NPDES permits based on the FEIS. Ecology, a party in this appeal, is not  
4 propounding this argument. The Board grants King County's motion on this issue.

5 F. Lack of Public Hearing and Inadequate Review of Public Comments (Issue 1(h))

6 Appellants contend that the public process conducted by Ecology on the approval of the  
7 NPDES permits was inadequate. Specifically, they argue that Ecology should be required to  
8 address public comments and that Ecology should have conducted a public hearing on the  
9 permits.

10 The legal requirements for responding to public comments and conducting public  
11 hearings, are found in WAC 173-220-050 and 173-220-090. WAC 173-220-050(2) requires  
12 Ecology to retain written comments that are submitted during the comment period, and  
13 considering them in making its decision. WAC 173-220-050(5) requires Ecology to provide the  
14 persons who have commented with a response to their comments. WAC 173-220-090 requires  
15 Ecology to hold a public hearing if it determines there is a significant public interest.

16 Appellants, in their briefing, point to no actual violations of these rules. In fact, they  
17 admit that Ecology followed the "letter of the law." (Appellants' Response to Summary  
18 Judgment at p. 23). However, they argue Ecology did not follow the spirit of the law because  
19 they did not facilitate opportunity for the public to comment on the "project." This misconstrues  
20 the nature of Ecology's responsibilities in approving the NPDES permits for discharges during  
21



1 construction. As is evident from the bulk of the issues raised in this appeal, Appellants' concerns  
2 are primarily with the overall project, not the NPDES permits for discharges during construction.  
3 These project concerns are beyond the scope of this appeal.

4 G. Need for Brightwater System (Issue 1(i))

5 Appellants contend that the Brightwater System is not needed. Even if this were true, it  
6 is clearly beyond the scope of the appeal on the NPDES permit. Therefore, the Board grants  
7 summary judgment on this issue.

8 Based on the foregoing analysis, the Board enters the following

9 ORDER

10 King County's Motion for Summary Judgment is granted on all issues, and this appeal is  
11 dismissed.

12 DATED this 21<sup>st</sup> day of October 2005.

14 POLLUTION CONTROL HEARINGS BOARD

15 BILL CLARKE, Chair

16 WILLIAM H. LYNCH, Member

17 Kay M. Brown, Administrative Appeals Judge, Presiding  
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